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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. 72-1619

EDMOND GABRIEL HARDY, JR.,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

The Respondent prays that the Petitioner's PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA seeking review of an Order of the Supreme Court of the State of North Carolina entered on March 6, 1973, be denied.

CITATIONS TO OPINIONS BELOW

The Order of the Supreme Court of North Carolina denying certiorari dated March 6, 1973, and the opinion of the Court of Appeals of North Carolina reported at 17 N.C. App. 169, filed December 19, 1972, 10:41 a.m., are set out in Appendix A of the Petitioner's PETITION FOR WRIT OF CERTIORARI (pp. 19-29). Respondent's Appendices I and II (pp. 9 and 16).

JURISDICTION

This case was decided by the Supreme Court of North Carolina by an order dated March 6, 1973, and by the Court of Appeals of North Carolina, State v. Edmond Gabriel Hardy, Jr., 17 N.C. App. 169, January 1973. The petitioner attempts to invoke the jurisdiction of this Court under 28 U.S.C. §1257(3) and further under the Fourth and Fifth and Fourteenth Amendments to the United States Constitution and Sections 19, 20 and 23, Article 1, Constitution of North Carolina. The Respondent contends that there has been no deprivation of rights secured by the Constitution of the United States and that this Court should not assume jurisdiction of this case.

STATEMENT

Defendant appellant was tried on a bill of indictment returned during the May 22, 1972, Session of Guilford County Superior Court charging defendant with felonious possession " . . . with intent to distribute a controlled substance, to wit: Heroin, which is included in Schedule I of the North Carolina Controlled Substances Act." (R p 8). Defendant was tried during the June 5, 1972, Session of Superior Court held in Guilford County, the Honorable Thomas W. Seay, Jr., presiding.

In open court, the solicitor announced that he would place defendant on trial only for simple possession of heroin and not for possession with intent to distribute. (R pp 12-13). Defendant entered a plea of not guilty. (R p 13). The jury returned a verdict of guilty of possession of heroin (R p 8) and defendant was sentenced to an active prison term of five (5) years. (R p 9). In apt time, defendant gave notice of appeal to the North Carolina Court of Appeals.

STATEMENT OF FACTS

On February 15, 1972, at 9:25 p.m. a warrant was issued to J. D. Heffinger of the Greensboro Police Department, Vice Division, authorizing him to search the person, automobile, and premises of defendant appellant for the controlled substance, heroin.

(R pp 4-5). This warrant was based on information supplied to Officer Heffinger by a reliable informer. After receiving the warrant, Officer Heffinger, along with several other officers from the Vice Division, went to 701-B Jennifer Street in Greensboro, where defendant was reportedly residing, twice between the hours of 9:30 p.m. and 12 o'clock midnight. On each of these occasions they failed to see defendant's 1970 red Oldsmobile with the license plate "SONNIE" in the area. (R p 19).

Shortly after midnight, Officer Heffinger received information over his radio from other officers that defendant's car had been spotted heading toward Jennifer Street. Officer Heffinger and Officer Bunton proceeded to 701-B Jennifer Street and positioned themselves at the rear of the building. Officers Daughtry and Gibson followed the defendant's car into the driveway of the apartment. As defendant stopped his car, Officer Heffinger approached the vehicle with his badge out, identified himself, and ordered the occupants of the car to get out. At this time Officer Heffinger read the search warrant to the defendant. (R pp 45-46). After reading the warrant, Officers Heffinger and Gibson searched the defendant and found in his right front pocket a bullet which, when the projectile portion was pulled away from the shell casing, revealed a small spoon containing some white powder (R p 26) which preliminary tests established as containing heroin. (R p 72). In searching the car, Officer Heffinger discovered a loaded .38 caliber pistol concealed under the dashboard to the left of the steering column, a box of .38 caliber ammunition in the back seat, and two needles and syringes under the dashboard just to the right of the steering column. Upon finding the pistol, defendant was placed under arrest for carrying a concealed weapon.

At about this time a crowd of approximately ten residents of the neighborhood gathered in the area and began cursing and using threatening language toward the officers. (R p 55). The search was being conducted in an alley which was not well-lighted. (R p 20). Officer Heffinger told defendant that his car was going to be moved to Kirk-Sineath Motors where the search would be continued. Enroute to Kirk-Sineath, Officer Bunton led in a police car, followed by defendant's car driven by Officer Daughtry, and finally the second police car driven by Officer Heffinger with defendant and Officer Gibson in the back seat. (R p 55).

At Kirk-Sineath Motors, defendant's car was driven about halfway into the garage area to get the front portion of the car out of the rain. Defendant was standing beside his car as the search continued. (R p 55). Officer Bunton asked defendant if he would like to get out of the cold and rain and sit in the police car to which defendant replied, "No, I want to stay here and see the stuff they find." (R p 57). Defendant had not been advised of his rights at this time. Officer Gibson, who was searching under the dashboard, found a bundle of glassine bags with a rubber band around it. (R p 56). The bags contained a white powder which was later established as containing heroin. (R p 72). After finding this bundle, Officer Gibson began to search under the dashboard again and said, "Let me see if I can find anything else." At this time defendant made the statement, "No, that's all there is." (R p 56). Defendant had still not been advised of his rights at this time.

ARGUMENT

I.

DID THE TRIAL COURT ERR IN FAILING TO QUASH THE SEARCH WARRANT AND THE EVIDENCE ALLEGEDLY FOUND AT THE SECOND SEARCH LOCATION?

There is ample evidence in the record to uphold the trial court's finding that the affidavit and search warrant involved here met all the legal requirements for validity. *State v. Spencer*, 281 N.C. 121; *State v. Altman*, 15 N.C. App. 257; *State v. Moye*, 12 N.C. App. 178; *State v. Bush*, 10 N.C. App. 247.

Appellant contends, without citing any authority, that the search of his automobile at Kirk-Sineath Motors after its removal from the scene of the initial search was unlawful. The officers involved in the search testified that the location where appellant was stopped was a poorly lighted alley and that a crowd of neighborhood residents gathered and began using abusive and threatening language toward them. Under these circumstances, it was perfectly reasonable for the officers to remove appellant and his vehicle to a safer locality in order to complete their lawful search. The North Carolina Supreme Court considered similar circumstances

in *State v. Hill*, 278 N.C. 365, 180 S.E. 2d 21, and said " . . . a careful search of the car was reasonable but impractical and perhaps dangerous at the time and place of arrest. The station house search a short time later was fully justified and constituted a lawful search." The U.S. Supreme Court has said, "It was not unreasonable in this case to take the car to the station house. All occupants in the car were arrested in a dark parking lot in the middle of the night. A careful search at that point was impractical and perhaps not safe for the officers, and it would serve the owner's convenience and safety of his car to have the vehicle and the keys together at the station house." *Chambers v. Maroney*, 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975 (Footnote 10) (1970). For other cases upholding searches similar to the one here complained of see *U.S. v. Powell*, 407 F. 2d 582 (1960); *State v. Gibson* and *State v. Dewalt*, 15 N.C. App. 445, 190 S.E. 2d 315.

II.

DID THE TRIAL COURT ERR IN ADMITTING EXTRAJUDICIAL STATEMENTS OF DEFENDANT WHICH WERE ALLEGEDLY MADE AFTER HIS ARREST AND WITHOUT THE WARNING AS TO HIS RIGHT OF COUNSEL AND SILENCE?

Appellant here contends, again without citing any authority for his proposition, that the trial court erred in allowing the officers to testify to certain statements made by appellant when he had not been given a *Miranda* warning. The statements complained of related to the officers' search for and subsequent finding of heroin in appellant's car. At the time he made these statements, appellant was under arrest for carrying a concealed weapon but had not been arrested for or charged with any violation of the North Carolina Controlled Substances Act.

The U.S. Supreme Court, in *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), stated:

> "The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be *interrogated . . . . Volunteered statements of any*

kind are not barred by the fifth amendment and their admissibility is not affected by our holding today." (Emphasis added).

The North Carolina Supreme Court has said:

> "The circumstances of this case do not show that defendant's statements were 'obtained by hope or fear,' *State v. Roberts*, 12 N.C. 259, or that they resulted from any sort of pressure, *State v. Perry, supra.* This record clearly shows that there was no custodial interrogation. Thus, it was not necessary for Agent Wise to warn defendant of his rights as required by *Miranda v. Arizona, supra." State v. Muse*, 280 N.C. 31, 185 S.E. 2d 214.

The trial court, on *voir dire*, correctly determined that appellant's statements were freely, understandingly and voluntarily made, without coercion and not as a result of any interrogation by the officers. The evidence was plenary in support of this finding.

In further support of this contention see also *State v. Haddock*, 281 N.C. 675, 190 S.E. 2d 208; *State v. Fletcher* and *State v. St. Arnold*, 279 N.C. 85, 181 S.E. 2d 405; *State v. Barber*, 270 N.C. 222, 154 S.E. 2d 104; *State v. Murphy*, 15 N.C. App. 420, 190 S.E. 2d 361; *State v. Beasley*, 10 N.C. App. 663, 179 S.E. 2d 820.

CONCLUSION

For reasons stated, the Respondent contends that the judgment of the trial court, as affirmed by the North Carolina Court of Appeals, in no way violated the Constitution of the United States. The Respondent respectfully submits that this court should, therefore, deny the Petition for Writ of Certiorari to the Supreme Court of North Carolina.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA upon the Attorney for the Petitioner, Edmond Gabriel Hardy, Jr., by placing copies of said RESPONSE in the United States Post Office at Raleigh, North Carolina, with postage prepaid and with the same addressed to:

Herman L. Taylor, Esquire
Lee, High, Taylor, Dansby & Stanback
Post Office Box 20027
Greensboro, North Carolina 74202

Counsel for Petitioner

This the _____ day of October, 1973.

_____
Assistant Attorney General
of North Carolina

APPENDIX I

NO. 7218SC773 EIGHTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

Fall Session 1972

STATE OF NORTH CAROLINA

v. From Guilford

ELMOND (EDMOND) GABRIEL HARDY, JR.

Appeal by defendant from Seay, Judge, 5 June 1972 Session of Superior Court held in Guilford County.

Defendant was charged in a bill of indictment, proper in form, with the felony of possession of a controlled substance (heroin) with intent to distribute. At the trial of the cause, the State announced its intention to "prosecute and proceed on simple possession of heroin." The defendant pleaded not guilty. Trial was by jury.

The evidence for the State tended to show that Officers Heffinger, Daughtry, Bunton and Gibson of the Greensboro Police Department, armed with a duly issued search warrant, stopped the defendant's car at the rear of the apartment at 701-B Jennifer Street, Greensboro, about 12:15 a.m. on 16 February 1972. The defendant was driving the automobile and there were two passengers. Officer Heffinger approached the automobile, identified himself as a police officer, and read the search warrant to the defendant. The search warrant commanded the affiant, or other lawful official, to "search Elmond G. Hardy, his person and his residence at 701-B Jennifer St., and his automobile, a 1970 red Oldsmobile, 1972 N.C. Lic.

SONNIE, for the property in question." Pursuant to the warrant, Officers Heffinger and Gibson search the person of the defendant and seized from his right front pants pocket a "bullet projectile that comes from the base of the shell" which had "a small gold-colored spoon at the base of the bullet," with some white powder in it.

Thereafter, the officers began to search defendant's automobile, which was the same automobile as was described in the search warrant. While the automobile was being searched, people came out of nearby apartments, gathered around the car, and cursed loudly, using threatening language toward the officers. Officer Heffinger recovered a loaded .38 caliber pistol and two needles and syringes from underneath the dashboard of the defendant's Oldsmobile near the steering column.

Heffinger placed the defendant under arrest for carrying a concealed weapon. Thereafter, because of the harrassment and threatening nature of the crowd gathered around the defendant's automobile, the officers took the defendant and drove the defendant's Oldsmobile and their two unmarked police cars to the premises of the Kirk-Sineath Motor Company about two miles from Jennifer Street, where the search was continued. As a result of the search, the officers recovered some nineteen glassine bags containing a white powder which was analyzed and determined to be the narcotic drug heroin. Defendant offered no evidence.

After his arraignment, at which defendant pleaded not guilty, and the selection of a jury, defendant moved to quash the search warrant upon the grounds of the insufficiency of the affidavit upon which it was based and to suppress the evidence seized pursuant thereto. The motion, after a voir dire hearing, was denied. At the close of all the evidence, the defendant moved for judgment as of nonsuit. The motion was denied. The jury returned a verdict of guilty of the unlawful possession of the controlled substance heroin. Judgment was entered on the verdict that defendant be imprisoned for a term of five years. Defendant appealed to the Court of Appeals, assigning error.

Attorney General Morgan and Associate Attorney Sherrill for the State.

Lee, High, Taylor & Dansby by Herman L. Taylor and Samuel S. Mitchell for defendant appellant.

MALLARD, Chief Judge. In the record on appeal the defendant is referred to as Edmond Gabriel Hardy, Jr., as Elmond Gabriel Hardy, Jr., and otherwise. In the search warrant he is referred to as Elmond Gabriel Hardy, Jr. In the bill of indictment he is referred to as Edmond Gabriel Hardy, Jr. In the title of the Judgment and Commitment on the original record filed with the Court of Appeals he is referred to as Edmond (Elmond) Gabriel Hardy. In the title to the defendant's "statement of case on appeal" and in a stipulation signed by his attorney he is referred to as Edmond Gabriel Hardy, Jr. In the title to the appearance bond he signed when he appealed to the Court of Appeals he is referred to as Edmond Gabriel Hardy. However, in places where a reproduction of his signature appears in the original record filed in this office, he appears to have signed his name "Elmond G. Hardy, Jr.". In the briefs and record on appeal and during the trial, no objection and no reference was made to the different spellings of the defendant's name. We are of the opinion that if the question had been raised, the doctrine of idem sonans would apply. See 4 Strong, N.C. Index 2d, Indictment and Warrant, §10.

Defendant assigns as error the denial of his motion to quash the search warrant and to suppress the evidence seized pursuant thereto. Defendant argues in his brief "that the trial court committed prejudicial and reversible error by failing to quash the search warrant and all evidence presumably gathered thereunder *by reason of the unreasonableness of the search* and its contravention of rights guaranteed to the defendant by the 4th and 14th Amendments to the United States Constitution and by Section 20 and 23 of Article I of the Constitution of North Carolina." (Emphasis added.) The defendant does not otherwise contend or argue in his brief that the affidavit used to obtain the search warrant was insufficient or that the search warrant was not properly issued. Defendant argues, however, that the search of the defendant's automobile was conducted in an unreasonable manner in that during the course of the search, the automobile was moved from the parking area near 701-B Jennifer Street to the grounds of the Kirk-Sineath Motor Company, approximately two miles from Jennifer Street, where the search was completed.

After the defendant moved to quash the search warrant, the trial judge conducted a voir dire hearing to determine the validity of the search warrant and the lawfulness of the search. After hearing the evidence and argument, the court made findings of fact and concluded that the affidavit was sufficient, that the search warrant was properly issued and was valid, and that:

> " . . . (T)he search was begun there at 701-B Jennifer Street and continued in the vicinity of the Kirk-Sineath Motor Company, being moved by reason of the arrival of a threatening and angry crowd; . . . that from the evidence and the facts found, the Court concludes that . . . the search was a reasonable search; . . . and that the reason for changing the location of the search was a valid one . . . ."

We hold that the affidavit used to obtain the search warrant was sufficient, the search warrant was valid, and there was ample evidence to support the findings of fact and conclusions of law made by Judge Seay.

We now consider whether the circumstances of this case made the search unreasonable as a matter of law.

In State v. Hill, 278 N.C. 365, 180 S.E. 2d 21 (1971), it is stated that:

> "We think it clear that *Chambers* controls the instant case. Here, the police, acting on reliable information, had probable cause to stop the 1964 Fairlane driven by Galloway and arrest him. As in *Chambers*, a careful search of the car was reasonable, but impractical and perhaps dangerous at the time and place of the arrest. The station house search a short time later was fully justified and constituted a lawful search."

Accord, Chambers v. Maroney, 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975 (1970); United States v. Chalk, 441 F. 2d 1277 (4th Cir. 1971), *cert. denied*, 404 U.S. 943.

In the case before us the State's evidence tended to show

that an "angry" crowd of people gathered around the officers while they were attempting to search the defendant's automobile there in the dark parking area back of the apartment building. Some of the members of this group were cursing in a loud voice and making threats against the police officers. The police officers properly removed the arrested defendant and his automobile to a less turbulent scene in order to complete the search of the vehicle under the search warrant. This was the exercise by the police officers of proper precautionary measures, and it was not error to complete the search of the dfendant's automobile at a more tranquil scene.

It follows, therefore, that items seized as a result of that search were properly admitted in evidence, and no error was committed in denying the motion to quash the search warrant and suppress the evidence seized pursuant thereto. This assignment of error is overruled.

Defendant assigns as error the admission in evidence of inculpatory statements made by defendant after defendant had been arrested and while his automobile was being search and when the police officers had not informed defendant of his constitutional right to counsel and to remain silent.

Officer J.D. Heffinger of the Greensboro Police Department testified that:

> "Before the bags were found, Officer Bunton, who was standing with Mr. Hardy, asked Mr. Hardy if he wanted to go and sit in the police car out of the rain and cold. Mr. Hardy stated that —
>
> DEFENSE COUNSEL: Objection.
> COURT: Overruled. EXCEPTION NUMBER E-58.
>
> WITNESS (continuing):–that he did not, that he wanted to stay there and see what stuff that the officers found. About five or ten minutes passed before the glassine bags were found. As I was counting the bags, Detective Gibson again laid down in the seat and started to reach up under the dash and he said, 'Let me see if I can find anything else.' Mr. Hardy

said, 'No, that's all there is.'

MR. TAYLOR: Objection to that and move to strike."

On voir dire examination, the court concluded, on facts properly found and supported by the evidence, that the "response and statement made by the defendant was freely and understandingly and voluntarily made, without coercion; that it was not as the result of an interrogation . . . . Further, that when Officer Gibson found certain glassine bags . . . that the defendant made a spontaneous statement at that time; that the statement was not in response to any questions directed toward him and was not the product of any threat, offer of reward, or intimidation of the defendant," and thereupon overruled the objection and motion to strike.

The issue is whether the circumstances of this case, as a matter of law, rendered the statements inadmissible.

The statements made by defendant to Officers Bunton and Gibson were inculpatory since they admitted, in effect, that defendant had heroin under his control, hidden in his car. Moreover, defendant was under arrest when he made the statements and was in a police dominated atmosphere. However, the fact that defendant was in custody when he made the inculpatory statements does not of itself render them inadmissible. State v. Muse, 280 N.C. 31, 185 S.E. 2d 214 (1971), *cert. denied*, 406 U.S. 974; State v. Fletcher and State v. St. Arnold, 279 N.C. 85, 181 S.E. 2d 405 (1971). Voluntariness remains the test of admissibility of inculpatory statements. State v. Fletcher and State v. St. Arnold, supra; State v. McCloud, 276 N.C. 518, 173 S.E. 2d 753 (1970). The so-called "Miranda warnings" are only required when a defendant is subjected to a custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602, 10 A.L.R. 3d 974 (1966); State v. Fletcher and State v. St. Arnold, supra; State v. Meadows, 272 N.C. 327, 158 S.E. 2d 638 (1968). Volunteered statements are competent evidence, and their admission is not barred under any theory of the law, state or federal. State v. Haddock, 281 N.C. 675, 190 S.E. 2d 208 (1972); State v. Ratliff, 281 N.C. 397, 189 S.E. 2d 179 (1972); State v. Stepney, 280 N.C. 306, 185 S.E. 2d 844 (1972); State v. Chance, 279 N.C. 643, 185 S.E. 2d 227 (1971).

Under the totality of the circumstances of this case, the inculpatory statements made by the defendant were not coerced as a result of a custodial interrogation; rather, the statements were volunteered and were properly admitted in evidence regardless of the fact that no "Miranda warnings" were given the defendant before making them. This assignment of error is overruled.

Defendant's other assignments of error, including his motion for nonsuit, were not brought forward in the brief and argued; therefore, they are taken as abandoned. Rules of Practice in the Court of Appeals, No. 28.

In the trial we find no prejudicial error.

No error.

Judges MORRIS and HEDRICK concur.

A TRUE COPY
THEODORE C. BROWN, JR.
CLERK OF THE COURT OF APPEALS
OF NORTH CAROLINA

By /s/ Pattie P. Barber
Deputy Clerk

September 20, 1973
(SEAL)

APPENDIX II

No. 151PC EIGHTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Fall Term 1972

****

STATE OF NORTH CAROLINA	)	ORDER DENYING
	)	PETITION FOR
v	)	WRIT OF
	)	CERTIORARI TO
EDMOND GABRIEL HARDY, JR.	)	THE N. C. COURT
	)	OF APPEALS
	)	(7218SC773)
	)	
	)	
	)	
	)	
	)	

****

This matter came on to be considered upon a petition for writ of certiorari to the N. C. Court of Appeals to review its decision on the 6th day of March, 1973, by the Chief Justice and Associate Justices of the Supreme Court of North Carolina, to whom it appeared that the said petition should be denied.

NOW, THEREFORE, it is ordered accordingly by the Court in conference that the petition be and the same is hereby denied, and that it be so certified to the Clerk of the N. C Court of Appeals and to counsel for all the parties.

Witness my hand and official seal, the the 6th day of March, 1973.

/s/ Adrian J. Newton
Clerk of the Supreme Court

(SEAL)

cc: Mr. Russell G. Sherrill, III,
Associate Attorney General
Mr. Samuel S. Mitchell,
Attorney at Law
Mr. Herman L. Taylor,
Attorney at Law
Mr. William Douglas Albright,
Solicitor